IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1923

No. 486

UNITED STATES BEDDING COMPANY
Appellant

vs.

THE UNITED STATES
Appellee

APPEAL FROM THE COURT OF CLAIMS

APPELLANT'S BRIEF

STATEMENT OF THE CASE

Appellant owned seven hundred bales of cotton linters May 27, 1918, when the defendant through the War Industries Board issued a regulation, being a compul-

sory order requisitioning all existing stocks of cotton linters and forbade the appellant and others to sell any cotton linters to anyone but the Government (p. 3) and on July 10, 1918, issued another regulation fixing a price and grade for the linters but not making same obligatory and the two regulations provided that if the appellant would not accept the price fixed by the Government, the Government would take the linters at the "actual value of the commodity" and the appellant should be given an opportunity to establish the value.

It is alleged that from May 27, 1918, to November 19, 1918, because of the regulations appellant could not sell its linters to anyone except the Government (p. 2, par. 5), and during that period or rather when all the linters were released in November, the market price had greatly decreased from what it was in May and July.

In July the defendants, through the Dupont American Industries, Inc., its duly authorized agent, issued a requisition to the appellant for the said seven hundred bales of cotton linters, offering therefor $20,548.60, but the appellant refused to accept this and demanded $32,392.78, which was the minimum market value of the linters, appellant then being able to sell the same for that amount or more; thereupon the defendant began a commandeering process under the regulations to fix the value, but before completing this process the defendant released the linters and the appellant was not able to get more out of them than $20,548.60 because of the fall in the market price and the appellant suffered a loss of the difference between that amount and $32,392.78, the minimum market value when taken, namely, $11,744.18, the amount of the claim

in suit with interest from November 19, 1918. The appellant alleges that the Government having prevented it from selling its linters, having requisitioned and having taken same for its own use and benefit in the war emergency and held same from May 27 to November 19, 1918, is liable to the appellant for the damages for being deprived of its property during this period and being prevented from selling same at the highest market value in May and July.

ASSIGNMENT OF ERRORS.

The Court erred in holding:

1. The averments do not show a contract express or implied, whereby the Government agreed to pay for the linters.
2. There was no taking or appropriation by the Government of the plaintiff's linters.
3. The plaintiff refused the Government's price for its linters and "held same to be commandeered," and this course was not adopted by the Government.
4. The order "releasing all linters" gives no right of action.
5. The demurrer should be sustained.

THE ARGUMENT

1. The exhibits, "A" and "B," show clearly an implied agreement of the Government to buy at a fixed price or if the appellant would not accept that price, the Government would "take" linters and the price be determined.

This is not only an agreement of the Government to

buy, but also an agreement by regulation and the appellant was entitled to recover under the regulation as on a contract (Maddox vs. U. S. 20 C. Cl. 192; Gulf Transit Co. vs. U. S. 43 Ct. Cls. 183).

Furthermore, the Government issued a specific requisition (p. 2, par. 3), which is a compulsory or obligatory contract. Roxford Knitting Company vs. Moore, 265 Fed. 177 (certiorari denied 40 Sup. Ct. 588); U. S. vs. Russell, 13 Wall. 623, where it was held that the temporary taking of personal property makes the Government liable for the damage during the time the property was held by the Government and used to its benefit.

2, 3, 4 and 5. The regulations, Exhibits "A" and "B" and the requisition under paragraph 3, page 2, are clearly a "taking" of the property of the appellant for which the Government is liable, which liability is measured by the damage to the appellant, being the difference between the market value when taken in May and July and what the appellant could and did get out of them after they had been released by the Government in November, 1918. (All italics hereafter are mine.)

The allegations (par. 5, p. 2) show clearly that the market value of the linters was far in excess of the amount claimed, plus what the Government offered, as there was a big demand for linters, but the Government refused to allow anyone to sell except to the Government.

The Government having requisitioned and taken the appellant's linters under the regulations providing for a commandeering process, where they could not agree on the price, which provided an opportunity to the claimant to establish the actual value of the commodity,

the appellant is entitled to the market value of the linters at the time they were taken. In Vogelstein vs. U. S. 43 Sup. Ct. at 565, a case on mandatory orders, the Court said:

> "The market value of the copper taken at the time it was taken measures the owner's compensation. Seaboard Air Line Railway Co. vs. United States, 260 U. S. ....., 43 Sup. Ct. 354, 67 L. Ed. —, decided March 5, 1923; United States vs. Chandler-Dunbar Co., 229 U. S. 53, 80, 81; 33 Sup. Ct. 667; 57 L Ed. 1063; Boom Co. vs. Patterson, 98 U. S. 403, 407; 25 L. Ed. 206; U. S. vs. New River Colleries Co. (C. C. A.) 276 Fed. 690, affirmed this day 260 U. S. —, 43 Sup. Ct. 565, 67 L. Ed." —.

In the New River Colleries case (above) the Court said, at p. 557:

> "Nor was it an error to exclude evidence of the market prices of coal for domestic use, and to hold that market prices for export coal controlled. The owner cannot be required to suffer pecuniary loss. Upon an examination of the record we agree with the statement of the Circuit Court of Appeals (276 Fed. 690, 691) that, if the coal had not been taken by the United States, it could have been sold at the market price for export coal prevailing for spot deliveries at the time of the taking."

> "The owner was entitled to what it lost by the taking. That loss is measured by the money equivalent of the coal requisitioned. It is shown by

> the evidence that every day representatives of foreign firms were purchasing or trying to purchase export coal. Transactions were numerous and large quantities were sold. Export prices for spot coal were controlled by the supply and demand. *These facts indicate a free market. The owner had a right to sell in that market and it is clear that it could have obtained the prices there prevailing for export coal. It was entitled to these prices.*"

In U. S. vs. Rogers et al., 255 U. S. 163, 41 Sup. Ct. 281, 65 L. Ed. 566, Mr. Justice Day said:

> "Having taken the lands of the defendants in error, it was the duty of the Government to make just compensation as of the time when the owners *were deprived* of their property," citing Monongehela Navigation Co. vs. U. S. 147, U. S. 341, 13 Sup. Ct. 622, 37 L. Ed. 463.

Appellant could have sold its linters in July and August (par. 5, p. 2) for more than $32,392.78 had not they been requisitioned by appellee, therefore it is entitled to recover on the basis of the market price.

The Court of Claims itself in Peabody vs. United States, 43 Ct. Cl. 5, at page 16, has said:

> "Property has been well defined to be a person's right to possess, *use, enjoy* and *dispose* of a thing not inconsistent with the law of the land." (Citing 1 Lewis Eminent Domain, Sec. 54-58.)

We find in 1 Nichols (2nd Ed.) Eminent Domain,

336: "The word 'property' as used in the constitutional provision that property shall not be taken for the public use without just compensation, is treated as a word of most general import and is liberally construed. It is held to include every kind of *right* or *interest capable,* of *being enjoyed* as property and recognized as such, upon which it is practicable to place a money value. It embraces both real estate and personal property, tangible and *intangible,* incorporeal hereditaments and franchises."

In Section 20, Mr. Nichols adds: "Intangible property such as chosen in action, patent rights, franchises, charters, or any other form of contract are within the sweep of this sovereign authority (the power of eminent domain) as fully as land or other tangible property." This is nearly an exact quotation from Justice Lurton in Cincinnati vs. Louisville & Nashville Ry. Co., 223 U. S. 390 at 400; 32 Sup. Ct. 267.

The Government regulation prohibiting private parties as alleged from selling linters to anyone but the Government was a *"taking" of the linters* of the plaintiff, and it was in violation of his constitutional right, for when defining constitutional liberty, this Court said in Myer vs. Nebraska, 43 Sup. Ct., at 626:

> "While this court has not attempted to define with exactness the *liberty* thus granted, the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the *right of the individual to contract, to engage in any of the common occupations of life,* to acquire useful knowledge, to marry, establish a home and bring up children,

to worship God according to the dictates of his own conscience and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

And again at 627:

"The established doctrine is that *this liberty* may not be interfered with under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the Legislative power is not final or conclusive but is subject to supervision by the Courts. Lawton vs. Steele, 152 U. S. 133, 137; 14 Sup. Ct. 499; 38 L. Ed. 385."

In Terrace vs. Thompson, 44 Sup. Ct. 17, 18, 262 U. S. —, Mr. Justice Butler said:

"The Terraces' property rights in the land include the right to *use, lease* and *dispose of it for lawful purposes* (Buchanan vs. Warley, 245 U. S. 60, 74; 38 Sup. Ct. 16; 62 L. Ed. 149, L. R. A. 1918C, 210 Ann. Cas. 1918A, 1201) and the Constitution protects these essential attributes of property (Holden vs. Hardy, 169 U. S. 366, 391, 18 Sup. Ct. 383, 42 L. Ed. 780) and also protects Nakatsuka in his right to earn a livelihood by following the ordinary occupations of life (Truas vs. Raich supra; Meyer vs. State of Nebraska, 261 U. S. —, 43 Sup. Ct. 625, 67 L. Ed. —). If, as claimed, the state act is repugnant to the due process and equal protection clauses of the Four-

> teenth Amendment, then its enforcement will deprive the owners of their right to lease their land to Nakatsuka, and deprive him of his right to pursue the occupation of farmer and the threat to enforce it *constitutes a continuing unlawful restriction upon and infringement of the rights of appellants.* . . ."

The requisitioning of the linters under these orders as alleged (par. 3, p. 2) was a "taking" of property in violation of the Constitution for which the Government is liable. Tempel vs. U. S. 39 Sup. Ct. 56 at 59 and cases cited therein, U. S. vs. Gr. Falls Co. 112 U. S. 654, 5 Sup. Ct. 306; U. S. vs. Lynah 188 U. S. 445; 23 Sup. Ct. 349.

In Roxford Knitting Company vs. Moore, 265 Fed. 177 (Certiorari denied, 40 Sup. Ct. 588) the Court held that "orders" for supplies under the President's proclamation, made such "orders" *obligatory* on any person to whom such "orders" were given, and the Court stated at p. 192:

> "The majority of the Court is also satisfied that the officials of the United States gave the plaintiff to understand that it was required to manufacture the supplies demanded of it, that it had *no right to refuse to comply,* and that with this understanding, the supplies were furnished. That being so, effect should be given to the intent of Congress that *civil contracts* should be *postponed* to *orders compulsorily placed.*"

This case was approved and distinguished by this

Court in a note to Price and Co. vs. U. S., 43 Sup. Ct. 299, at 301, as was the case of United States vs. Russell, 13 Wall. 623.

> "A *requisition, like a taking by eminent domain, is not a taking under agreement. Acquiescence* on the part of a *loyal citizen* to the *taking* of his property by the sovereign is *not* the *equivalent* of the *making* of a *contract,* or the entering into of an agreement in the legal sense of that term, for the obtaining of the property in question. *A requisition is a one-sided exercise of authority, which depends either upon force or the acquiescence and loyalty of the owner of the property requisitioned, in order to accomplish the taking. Whether protest is entered or not, the obligation to repay the owner is the same.*" Benedict vs. U. S., 271 Fed. at p. 719.
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> "An importer had put into his invoice the price actually paid for goods, with charges, and proposed to enter them at the values thus fixed. The colector concluded that the value would be ascertained as of the time of shipment in New York which was considerably higher. The importer protested but in order to avoid the penalty which was threatened, he did make an addition to his invoice so as to escape that penalty. In an action to recover back the excess duties, the court held: 'This addition and its consequent payment of the higher duties were *so far from voluntary* in him that he accompanied them with remonstrances against thus being coerced to do the act in order to escape a greater evil and accompanied the payment with a protest against the legality of the course pur-

sued towards him.' Now it can hardly be meant in this class of cases, that, to make a payment involuntary, it should be done by actual violence or any physical duress. It suffices, if the payment is caused on the one part by an illegal demand, and made on the other part reluctantly and in consequence of that illegality, and without being able to regain possession of his property except by submitting to the payment." Maxwell vs. Griswold, 10 Howard, 243.

"Where the United States instituted an action for the recovery of money on a bond given with sureties, by a purser of the Navy and the defendants, in substance, pleaded that the bond was variant from that prescribed by law, and was under color of office, extorted from the obligor contrary to the statute, by the then Secretary of the Navy, as the condition of the purser's remaining in office and receiving its emoluments, and the United States demurred to this plea, it was held that the plea constituted a good bar to the action." U. S. vs. Tingey, 5 Peters, 115.

"Where the Internal Revenue Bureau requires a commission (on the sale of stamps) to be received in stamps instead of money and refused to modify its decision, receipts and settlements made in pursuance of that requirement and necessity were not voluntary in such sense as to preclude the claimant from subsequently insisting on his statutory rights and recovering such commissions. . . ."

"The *parties* were *not* on *equal terms*, The *appellant had no choice.* The only alternative was to submit to an illegal exaction or discontinue its business. It was in the power of the officers of the law and could only do as they required." Swift vs. U. S., 111 U. S. 22.

"The payment of money to an official to avoid an onerous penalty, though the imposition of that penalty might have been illegal was sufficient to make the payment an involuntary one. . . . When such duress is exerted under circumstances sufficient to influence the apprehensions and conduct of a prudent business man, payment of money wrongfully induced thereby ought not to be regarded as voluntary. When the duress has been exerted by one clothed with official authority or exercising a public employment, less evidence of compulsion or pressure is required." Robertson vs. Frank, 132 U. S., 17.

As said by Mr. *Justice Holmes* in Portsmouth Harbor Land & Hotel Co. vs. United States, 43 Sup. Ct. 135; 262 U. S. —; "If the acts amounted to a taking without assertion of an adverse right, a contract would be implied whether it was thought of or not."

Clearly there was a taking under the Constitution and a holding by the Government for its own use and benefit of the appellant's personal property whereby appellant was damaged and the demurrer should have been overruled and it should now be overrruled and this appeal reversed and remanded.

Respectfully submitted,

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